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No. 89-1711

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

JERRY D. SMITH
Petitioner
v.

UNITED STATES OF AMERICA
Respondent

REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

WILLIAM J. HARDY
(Counsel of Record)
WILLIAM D. PEASE
EASTLAND & HARDY
1815 H Street, N.W.-Suite 1200
Washington, D.C. 20006
(202) 785-0369

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

The Federal circuits are split on the question of whether it is proper to charge in one count a conspiracy whose objectives are both to defraud the United States and to commit specified Federal statutory violations when the statutory violations alleged define all of the wrongful conduct which is contemplated by the defrauding clause.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed were the United States of America, Petitioner, Jerry D. Smith, and his co-defendants G. Michael Kirchoff and Paul D. Smith.

TABLE OF CONTENTS

	PAGE
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Reply	3

TABLE OF AUTHORITIES

CASES	PAGE
Blockburger v. United States 284, U.S. 299 (19302)	9
Grady v. Corbin, 110 S.Ct. 2084 (1990)	9
United States v. Haga, 821 F.2d 1039 (5th Cir. 1987)	3
United States v. Klein, 124 F. Supp. 476, 480 (S.D.N.Y. 1954), aff'd on other grounds, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).	8
United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989)	4
United States v. Smith, 891 F.2d 703 (9th Cir. 1989)	7
United States v. Thompson, 814 F.2d 1472 (10th Cir. 1987)	3
ARTICLE	
Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405 (1959)	5

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Petitioner Jerry D. Smith, prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the opinion and judgment of that court in United States v. Jerry D. Smith, G. Michael Kirchoff, and Paul D. Smith.

OPINION BELOW

The opinion of the court of appeals is reported at 891 F.2d 703 (9th Cir. 1989). On July 10, 1990, the Ninth Circuit ordered its

opinion amended. The order is set forth at Appendix 1.

JURISDICTION

On May 4, 1990, Petitioner filed for a Writ of Certiorari and the United States filed its opposition on July 5, 1990. This Reply Brief is timely filed under Rule 15.6 of the Rules of this Court effective January 1, 1990.

STATUTE INVOLVED

Title 18, United States Code, Section 371:

> **Conspiracy to commit offense or to defraud United States.**
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If however, the offense, the commission of which is the object

> of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

REPLY

Judge John T. Noonan, author of the panel opinion, wrote that "[i]f Haga and Thompson are, right, it looks as though the defendants in our case have been charged with two different crimes in Count I and that therefore Count I is bad for duplicity... We, however, reject any implication of Haga and Thompson that section 371 creates two distinct conspiracy offenses," Pet. App. 13977. Petitioner submits that Judge Noonan issued a clarion call to this court to resolve the conflict among the Second, Fifth, Ninth, Tenth and the District of Columbia Circuits on the issue of the proper joinder of Section 371's two clauses. There can be no other meaning to the language in the panel opinion that "... it looks as though the

defendants in our case have been charged with two different crimes..." if Haga and Thompson are right. While the opinion goes on to reject the Haga-Thompson analysis, it does so on the basis that the Smith panel's analysis of prior case law and legislative history is correct and the analyses Fifth Circuit and Tenth Circuit are wrong.

Respondent's additional claim that there is no conflict between Smith and United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989), is belied by the grudging admission that "... we recognize that if that language [of Minarik] were applied to this case, it might require reversal of petitioner's conspiracy conviction." (Resp. Br. 14). Respondent almost admits that if petitioner were tried in the Sixth Circuit, the joinder at issue here would require reversal. There can be no clearer example of a conflict between two circuits.

Respondent also erroneously claims that petitioner raises here for the first time what respondent chooses to call an "exclusivity argument" derived from Minarik.

Minarik was decided on May 18, 1989, after all briefs were filed in this case. Petitioner notified the Ninth Circuit pursuant to Fed. R. App. P. 28(j) of his reliance on the decision and specifically addressed Minarik at oral argument by referring to the 28(j) letter and stating that appellant "strongly relied" on Minarik. (Tape of Oral Argument).

The issue of the proper joinder of the defraud and offense clauses is clearly raised and fully discussed in Professor Goldstein's article, Conspiracy to Defraud the United States, 68 Yale L.J. 405 (1959). It is a fair conclusion that Minarik, 875 F.2d at 1193, Haga, 821 F.2d at 1039, fn. 4, and

Smith, Pet. App. 13978, take their diverse inspirations from Goldstein's article because each panel cites the article as support for their conflicting decisions.

More importantly, petitioner raised the issue addressed in Minarik in his opening brief when he complained that the conspiracy count allowed his conviction for "... the same conduct which caused no pecuniary loss and which caused pecuniary loss," Pet. C.A. Br. 45-46, because he was charged in one count with conspiracy to defraud the United States under the defrauding clause and a conspiracy to defraud the United States through a scheme and artifice to defraud under the mail fraud statute (18 U.S.C. 1341). The only difference between the two objectives is that mail fraud requires an illicit attempt to obtain money or property. Petitioner also notes that of the two other offenses cited as the conspiracy's

objectives, false statements, (18 U.S.C. 1014) and false entry (18 U.S.C. 1006), the conspiracy to make a false entry to deceive auditors bears more than a passing resemblance to defrauding the United States by deceiving the auditors.

Petitioner also addressed this issue at some length in his reply brief, Pet. C.A.R. Brief at pp. 11-12).

Petitioner submits that the duplicity claim and, as respondent likes to call it, the "exclusivity claim," were properly before the court when it authored the opinion in this case.

The court in Smith, Pet. App. 13979, held that "the clause 'defraud the United States' merely expands the scope of the offense by including another object of a conspiracy that might not otherwise be covered by the clause 'any offense.'" (emphasis added).

Petitioner contends that if the conspiracy's objectives are "otherwise" covered by the offenses contained in the federal penal code, then the use of the defrauding clause is superfluous. Such an open-ended, undefined crime has no place in the criminal law because no one can know what is prohibited. Such a use of the defrauding clause can best be described as a "catch-all," i.e., if the jury can't decide what offense an accused conspired to commit, the "not otherwise covered" rationale of the defrauding clause provides a basis to find guilt anyway. As Judge Palmieri has explained, "[t]he second part of this disjunctive phrase [the defraud clause] is of broad import and contemplates wrongs other than conspiracies to commit offenses against the United States which are defined by statute." United States v. Klein, 124 F.Supp. 476, 480 (S.D.N.Y. 1954), aff'd on other grounds, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958).

The petition in this case was filed on May 4, 1990. This Court decided Grady v. Corbin, 110 S.Ct. 2084 (1990) on May 29, 1990, wherein it was held that if two successive prosecutions were not barred by the test of Blockburger v. United States 284 U.S. 299 (193(2) (does each offense require proof a fact that the other does not), the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution.

Petitioner respectfully submits that the "not otherwise ... covered" rationale of the Smith opinion squarely conflicts with the holding in Grady v. Corbin, supra, if one count charges a conspiracy whose objectives are both to defraud the United States and to commit specified Federal statutory violations when the statutory violations alleged define

all of the wrongful conduct which is contemplated by the defrauding clause. This is because if the prohibited conduct was, in fact, "otherwise" covered by the statutory violations, then the inclusion of the defrauding clause as a conspiratorial objective would cause the jury to twice consider the accused's guilt for the same offense.

Petitioner requests that a Writ of Certiorari be issued to the Ninth Circuit to review its opinion and order.

Respectfully submitted,

WILLIAM J. HARDY
(Counsel of Record)
WILLIAM D. PEASE
EASTLAND & HARDY
1815 H St., N.W.-Suite 1200
Washington, D.C. 20006
(202) 785-0369

Counsel for Petitioner
Jerry D. Smith

Ref: 07259001dmg

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JERRY D. SMITH, PAUL D. SMITH, and G. MICHAEL KIRCHOFF, *Defendants-Appellants.*	Nos. 88-3168, 88-3185 and 88-3189 D.C. No. CR 87-85-JCC ORDER

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
June 26, 1989—Seattle, Washington

Opinion Filed December 4, 1989
Order Filed July 10, 1990

Before: Jerome Farris, John T. Noonan, Jr. and Edward Leavy, Circuit Judges.

ORDER

The Opinion filed on December 4, 1989 is amended as follows:

> The second full paragraph of Part V on page 13980 is moved to page 13974 immediately preceding Part II.